



## Public Availability of Inoperative Agency Guidance Documents

### Committee on Regulation

#### Proposed Recommendation from Committee on Regulation | November 9, 2021

1           Agencies issue guidance documents to help explain their programs and policies,  
2   announce their interpretation of laws, and communicate other important information to regulated  
3   entities, regulatory beneficiaries, and the broader public.<sup>1</sup> The Administrative Conference has  
4   issued several recent recommendations regarding guidance documents.<sup>2</sup> Among them was  
5   Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, which encourages  
6   agencies to facilitate public access to guidance documents on their websites.

7           Over time, a given guidance document may no longer reflect an agency’s position. An  
8   agency may rescind the document in whole or in part by announcing that it no longer reflects the  
9   agency’s position. Even without being rescinded in whole or in part, a guidance document may  
10   be superseded in whole or in part by later statutory, regulatory, or judicial developments, or it  
11   may fall into disuse in whole or in part. The present Recommendation terms these documents  
12   “inoperative guidance documents.”

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<sup>1</sup> Guidance documents include what the Administrative Procedure Act calls “interpretive rules” and “general statements of policy.” 5 U.S.C. § 553(b). They may also include other materials considered to be guidance documents under other, separate definitions adopted by government agencies. *See* Admin. Conf. of the U.S., Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, 84 Fed. Reg. 38931, 38931 (Aug. 8, 2019).

<sup>2</sup> *See, e.g.*, Recommendation 2019-3, *supra* note 1; Admin. Conf. of the U.S., Recommendation 2019-1, *Agency Guidance Through Interpretive Rules*, 84 Fed. Reg. 38927 (Aug. 8, 2019); Admin. Conf. of the U.S., Recommendation 2017-5, *Agency Guidance Through Policy Statements*, 82 Fed. Reg. 61734 (Dec. 29, 2017); Admin. Conf. of the U.S., Recommendation 2014-3, *Guidance in the Rulemaking Process*, 79 Fed. Reg. 35992 (June 25, 2014).



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13 Some inoperative guidance documents will be of interest to the public because they  
14 disclose how an agency’s legal interpretations have changed<sup>3</sup> or how policies or programs have  
15 changed over time.<sup>4</sup> But if these documents are not posted on an agency’s website, they will be  
16 either inaccessible (except through a Freedom of Information Act (FOIA) request), in the case of  
17 documents not published in the *Federal Register*, or not as accessible as they should be, in the  
18 case of documents that were noticed in the *Federal Register*.<sup>5</sup>

19 Three statutes require agencies to make some inoperative guidance documents publicly  
20 available. The Federal Records Act requires agencies to post on their websites materials that are  
21 of “general interest or use to the public.”<sup>6</sup> FOIA requires agencies to publish notices in the  
22 *Federal Register* when they have rescinded or partially rescinded guidance documents that are  
23 addressed to the public generally rather than to specific individuals or organizations.<sup>7</sup> The E-  
24 Government Act requires agencies to publish these rescission and partial rescission notices on  
25 their websites.<sup>8</sup> Many agencies have also issued regulations pertaining to the public availability  
26 of their inoperative guidance documents.

27 The Office of Management and Budget’s 2007 *Final Bulletin for Agency Good Guidance*  
28 *Practices* imposes additional requirements on agencies relating to inoperative guidance  
29 documents. It directs all agencies other than independent regulatory agencies to post notices on  
30 their websites whenever they have rescinded or partially rescinded significant guidance  
31 documents and to keep those notices in place for a year. It also encourages agencies to stamp or

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<sup>3</sup> See Blake Emerson & Ronald Levin, *Agency Guidance Through Interpretive Rules: Research and Analysis* (May 28, 2019) (report to the Admin. Conf. of the U.S.).

<sup>4</sup> See Nicholas R. Parrillo, *Agency Guidance Through Policy Statements: An Institutional Perspective* (Oct. 12, 2017) (report to the Admin. Conf. of the U.S.).

<sup>5</sup> See Recommendation 2019-3, *supra* note 1.

<sup>6</sup> See 44 U.S.C. § 3102(2).

<sup>7</sup> See 5 U.S.C. § 552(a)(1); *Nat’l Org. of Veterans’ Advocs., Inc. v. Sec’y of Veterans Affs.*, 981 F.3d 1360, 1375 (Fed. Cir. 2020).

<sup>8</sup> See E-Government Act of 2002, Pub. L. No. 107-347, § 206, 116 Stat. 2899, 2916 (codified at 44 U.S.C. § 3501 note).



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32 otherwise prominently identify as “superseded” those significant guidance documents that have  
33 become inoperative but which remain available for historical purposes.<sup>9</sup>

34 Recommendation 2019-3, though concerned primarily with operative guidance  
35 documents, makes several recommendations relating to the posting of inoperative guidance  
36 documents. In summary, it recommends that agencies (1) mark posted guidance documents to  
37 indicate whether they are current or were withdrawn or rescinded and (2) in the case of rescinded  
38 or withdrawn documents, note their rescission or withdrawal date and provide links to any  
39 successor documents.

40 Recommendation 2019-3 reserved the question, however, of which inoperative guidance  
41 documents agencies should publish online. This Recommendation takes up that issue, building  
42 on the principles Recommendation 2019-3 set forth for operative documents by extending them,  
43 as appropriate, to inoperative guidance documents. Specifically, it advises agencies to develop  
44 written procedures for publishing inoperative guidance documents, devise effective strategies for  
45 labeling and organizing these documents on their websites, and deploy other means of  
46 disseminating information about these documents.<sup>10</sup> The Recommendation also encourages  
47 agencies to provide clear cross-references or links between inoperative guidance documents and  
48 any operative guidance documents replacing or modifying them.

49 This Recommendation, like Recommendation 2019-3, accounts for differences across  
50 agencies in terms of the number of guidance documents they issue, how they use guidance  
51 documents, and their resources and capacities for managing online access to these documents.<sup>11</sup>

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<sup>9</sup> See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB BULL. NO. 07-02, FINAL BULLETIN FOR AGENCY GOOD GUIDANCE PRACTICES (2007).

<sup>10</sup> Several paragraphs of this Recommendation directly or indirectly apply the paragraphs of Recommendation 2019-3 to inoperative guidance documents. Compare Paragraph 1 of this Recommendation with Recommendation 2019-3, ¶ 1; Paragraph 3 with Recommendation 2019-3, ¶¶ 4, 7, 9; Paragraph 4 with Recommendation 2019-3, ¶ 8; and Paragraph 6 with Recommendation 2019-3, ¶ 11.

<sup>11</sup> See Todd Rubin, Public Availability of Inoperative Agency Guidance Documents (Nov. 19, 2021) (report to the Admin. Conf. of the U.S.); Cary Coglianese, Public Availability of Agency Guidance Documents (May 15, 2019) (report to the Admin. Conf. of the U.S.).



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52 Accordingly, although it is likely that agencies following this Recommendation will make some  
53 of their inoperative guidance documents more readily available to the public, this  
54 Recommendation should not be understood as necessarily advising agencies to post the full  
55 universe of their inoperative guidance documents online.

56 This Recommendation is limited to guidance documents that become inoperative in the  
57 future. Agencies may, of course, choose to apply it retrospectively to existing inoperative  
58 guidance documents.

### RECOMMENDATION

#### **Establishing Written Procedures Governing the Public Availability of Inoperative Guidance Documents**

- 59 1. Each agency should develop and publish on its website written procedures governing the  
60 public availability of inoperative guidance documents and should consider doing the  
61 following in its procedures:
- 62 a. Explaining what it considers to be inoperative guidance documents for purposes  
63 of its procedures instituted under this Recommendation;
  - 64 b. Identifying which one or more of the following kinds of inoperative guidance  
65 documents are covered by its procedures: rescinded guidance documents, partially  
66 rescinded guidance documents, superseded guidance documents, partially  
67 superseded guidance documents, or guidance documents that have fallen into  
68 disuse in whole or in part;
  - 69 c. Identifying, within the kinds of inoperative guidance documents covered by its  
70 procedures, which categories of inoperative guidance documents will be  
71 published on its website and otherwise made publicly available, taking into  
72 consideration the categories articulated in Paragraph 2 below;
  - 73 d. Explaining how it will include links or cross-references between any related  
74 inoperative and operative guidance documents;



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- 75 e. Specifying how long inoperative guidance documents will be retained on its  
76 website;
- 77 f. Specifying whether some types of previously unpublished operative guidance  
78 documents will be posted on its website and otherwise made publicly available  
79 when they become inoperative and, if so, under what circumstances;
- 80 g. Providing for how inoperative guidance documents will be organized on its  
81 website to facilitate searching and public access;
- 82 h. Identifying, as provided in Paragraph 4 below, what labels and explanations it will  
83 use to communicate clearly the inoperative status of guidance documents; and
- 84 i. Indicating whether any or all of the procedures should be applied retroactively.  
85

### **Determining Which Categories of Inoperative Guidance Documents to Publish Online and Otherwise Make Publicly Available**

- 86 2. Each agency should consider publishing on its website and otherwise making publicly  
87 available one or more of the following categories of inoperative guidance documents:
- 88 a. Inoperative guidance documents whose operative versions it made publicly  
89 available;
- 90 b. Inoperative guidance documents that, if they were operative, would be made  
91 publicly available under its current policies;
- 92 c. Inoperative guidance documents that have been replaced or amended by currently  
93 operative guidance documents;
- 94 d. Inoperative guidance documents that expressed policies or legal interpretations  
95 that remain relevant to understanding current law or policy;
- 96 e. Inoperative guidance documents that generated reliance interests when they were  
97 operative;
- 98 f. Inoperative guidance documents that generate—or, when they were operative,  
99 generated—numerous unique inquiries from the public;
- 100 g. Inoperative guidance documents that are—or, when operative, were—the subject  
101 of attention in the general media or specialized publications relevant to the



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- 102 agency, or have been cited frequently in other agency documents, such as permits,  
103 licenses, grants, loans, contracts, or briefs;
- 104 h. Inoperative guidance documents whose operative versions generated a high level  
105 of public participation when they were originally being formulated; and
- 106 i. Inoperative guidance documents that, when operative or originally being  
107 formulated, had been published in the *Unified Agenda of Federal Regulatory and*  
108 *Deregulatory Actions* or were considered “significant guidance documents” under  
109 the Office of Management and Budget’s *Final Bulletin for Agency Good*  
110 *Guidance Practices*.

### **Organizing and Labeling Inoperative Guidance Documents Available Online**

- 111 3. Each agency should organize its inoperative guidance documents on its website to make  
112 it easy for members of the public to find them and relate them to any successor guidance  
113 documents. The agency should consider one or more of the following approaches:
- 114 a. Assigning a unique guidance identification number to each inoperative guidance  
115 document, if this number had not already been assigned when the document was  
116 operative;
- 117 b. Creating a table that is indexed, tagged, or sortable and is dedicated exclusively to  
118 displaying entries for inoperative guidance documents, with links to these  
119 documents;
- 120 c. Providing a search function that enables retrieval of inoperative guidance  
121 documents;
- 122 d. Using a method, such as a pull-down menu, that allows the public to view  
123 inoperative guidance documents and see that they are inoperative; and
- 124 e. Including links or notations within inoperative guidance documents, pointing to  
125 any successor operative guidance documents.
- 126 4. Each agency should label inoperative guidance documents on its website to ensure that  
127 the public can readily understand the inoperative status of those guidance documents. The  
128 agency should consider adopting one or more of the following methods for publicly



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- 129 labeling its guidance documents as inoperative and then using the selected method or  
130 methods consistently:
- 131 a. Including a watermark that displays “rescinded,” “partially rescinded,”  
132 “superseded,” “partially superseded,” “not in use,” or similar terminology as  
133 appropriate across each page of an inoperative guidance document;
  - 134 b. Including words such as “rescinded,” “partially rescinded,” “superseded,”  
135 “partially superseded,” “not in use,” or similar terminology as appropriate within  
136 a table in which links to inoperative guidance documents appear;
  - 137 c. Using an appropriate method, including redline versions or lists of changes, to  
138 communicate changes made to a guidance document that has been partially  
139 rescinded or superseded;
  - 140 d. Including a prominent stamp at the top of an inoperative guidance document  
141 noting that the document is inoperative and indicating the date it became  
142 inoperative;
  - 143 e. Providing cross-references, using links or notations, from an inoperative guidance  
144 document to any successor versions of the guidance document, and vice versa;  
145 and
  - 146 f. Publishing a notice of rescission or partial rescission of a guidance document on  
147 the agency’s website and providing links to this notice in the inoperative guidance  
148 document.

### **Using Means in Addition to Agency Websites to Notify the Public When a Guidance Document Has Become Inoperative**

- 149 5. At a minimum, an agency should notify the public that a guidance document has become  
150 inoperative in the same way that it notified the public that the operative version of the  
151 guidance document was issued or in the same way it would notify the public that an



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- 152           operative version of the guidance document has been issued under the agency’s current  
153           policies.
- 154       6. An agency should consider using one or more of the following methods to notify the  
155       public when a guidance document has become inoperative:
- 156           a. Publishing this notification in the *Federal Register* even when not required to do  
157           so by law;
  - 158           b. Sending this notification over an agency listserv or to a similar mailing list to  
159           which the public can subscribe;
  - 160           c. Providing this notification during virtual meetings, in-person meetings, or  
161           webinars involving the public; and
  - 162           d. Publishing this notification in a press release.
- 163       7. In disseminating notifications as indicated in Paragraph 6, agencies should consider  
164       including cross-references to any successor guidance documents.